

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT STEWART,

Plaintiff,

VS.

BANK OF AMERICA, N.A.,

Defendant.

Case No.: 2:19-cv-00699-GMN-NJK

ORDER

This matter is before the Court on the U.S. Court of Appeals for the Ninth Circuit's Referral Notice (ECF No. 54), filed on April 16, 2020. Also before the Court is pro se Plaintiff Robert Stewart's Motion for Leave to Proceed *in forma pauperis* on Appeal, (ECF No. 56), filed on May 4, 2020.

The Ninth Circuit has instructed this Court to determine whether Plaintiff's *in forma pauperis* status should continue for this appeal. "An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3). "In the absence of some evident improper motive, the applicant's good faith is established by presentation of any issue that is not plainly frivolous." *Ellis v. United States*, 356 U.S. 674, 674 (1958). Like an *in forma pauperis* complaint, an appeal is frivolous if it lacks an arguable basis in law or fact. *O'Loughlin v. Doe*, 920 F.2d 614, 617 (9th Cir. 1990) (citing *Franklin v. Murphy*, 745 F.2d 1221, 1227 (9th Cir. 1984)).

Plaintiff appeals the Court’s Order granting Defendant Bank of America, N.A.’s (“BANA”) Motion to Dismiss and dismissing Plaintiff’s Complaint with prejudice. As stated in the Court’s March 24, 2020 Order, (ECF No. 47), “[j]udicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during

1 the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to
2 identify the cause of action as a contingent asset.” *Hamilton v. State Farm Fire & Cas. Co.*, 270
3 F.3d 778, 782 (9th Cir. 2001). Here, Plaintiff filed a Chapter 7 Bankruptcy Action and did not
4 disclose the instant case in his bankruptcy schedules and disclosures as required by 11 U.S.C.
5 § 521. Plaintiff is thus judicially estopped from alleging any of causes of action against
6 BANA. Moreover, Plaintiff’s Notice of Appeal, (ECF No. 51), and Motion for Leave to
7 Proceed *in forma pauperis* on Appeal, (ECF No. 56), do not present any issue that is not plainly
8 frivolous. *O’Loughlin*, 920 F.2d at 617. Accordingly, the Court certifies that any appeal taken
9 from its March 24, 2020 Order and from the accompanying judgment of this action is not taken
10 in good faith. 28 U.S.C. § 1915(a)(3); *Ellis*, 356 U.S. 674–75.

11 **I. CONCLUSION**

12 **IT IS HEREBY ORDERED** that the Court certifies that Plaintiff’s appeal is not taken
13 in good faith pursuant to 28 U.S.C. § 1915(a)(3). Plaintiff’s Motion to Proceed *in forma*
14 *pauperis* on Appeal, (ECF No. 56), is **DENIED**.

15 **DATED** this 7 day of May, 2020.

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Gloria M. Navarro, District Judge
United States District Court